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NOTES

TO TELL THE TRUTH: AN ANALYSIS OF FIDUCIARY DISCLOSURE DUTIES AND EMPLOYEE STANDING TO ASSERT CLAIMS UNDER ERISA

The Employee Retirement Income Security Act of 1974¹ ("ERISA") was enacted to replace existing federal statutes governing private deferred compensation schemes and retirement programs.² Social and economic growth had diluted the effectiveness of such acts as the Railroad Retirement Act,³ the Social Security Act,⁴ and the Welfare and Pension Plan Disclosure Act.⁵ Congress

¹ Pub. L. No. 93-406, 88 Stat. 891 (codified as amended in 29 U.S.C. §§ 1101-461 (1988) and in scattered sections of 26 U.S.C.).

² H.R. REP. NO. 533, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4642 (noting public dissatisfaction with early governmental programs like Railroad Retirement Act, Social Security Act and Welfare and Pension Plan Disclosure Act fueled private pension movement in United States).

³ Pub. L. No. 93-445, 88 Stat. 1305 (1974) (codified as amended at 45 U.S.C. §§ 201-208). The 1994 amendments were designed to completely restructure the Railroad Retirement Act of 1937. The new benefits computation technique was designed to prevent "future excess costs to the Railroad Retirement System" and to "bring about more adequate coordination" between the Railroad Act and Social Security Act. S. REP. NO. 1163, 93d Cong., 2d Sess. 3 (1975), *reprinted in* 1974 U.S.C.C.A.N. 5702, 5702.

⁴ Pub. L. No. 87-543, 76 Stat. 185 (1962) (codified as amended at 29 U.S.C. § 301) (designed for the purpose of furnishing "financial assistance to aged and needy individuals"). Section 301 was later repealed, effective January 1, 1974, except with respect to Puerto Rico, Guam, and the Virgin Islands. Pub. L. No. 92-603, 86 Stat. 1484 (1972) (codified as amended at 29 U.S.C. § 303(a)(b)).

enacted ERISA with the dual purpose of protecting employees' rights to pension benefits and alleviating undue burdens on the pension and welfare system.⁶ Expanded protection of private pension plans and rapid accumulation of assets into the reserve benefit structure⁷ were also intended to increase the number of employees participating in private retirement plans,⁸ and are consistent with legislative intent to enhance workers' benefit protection.⁹ Unfortunately, such expanded benefit security threatens to undermine Congress's subsidiary goal of containing pension costs and avoiding undue burdens on the pension system.¹⁰

⁵ Pub. L. No. 85-836, 72 Stat. 997 (1934) (codified as amended in 29 U.S.C. §§ 303-309). Later repealed by Pub. L. No. 93-406, 88 Stat. 851 (1974) (codified in 29 U.S.C. § 111(a)(1)). 29 U.S.C. § 301 set forth Congressional findings and policy with respect to welfare and pension plan disclosure. See Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified in 29 U.S.C. § 1001. Congress found that the growth in "size, scope and numbers" of employee benefit and pension plans was "rapid and substantial." *Id.* As such, Congress endeavored to assure the "equitable character" and "financial soundness" of these plans. *Id.* Congress also sought to ensure proper disclosure standards and safeguards regarding the "establishment, operation and administration of such plans." *Id.* To be sure the "lack and employee information and adequate safeguards concerning the operation of existing plans, Congress also improved disclosure in the interests of employees and their beneficiaries, and to provide for the general welfare and the flow of commerce." *Id.*

⁶ H.R. REP. NO. 533, 93d Cong., 2d Sess. 3, reprinted in 1974 U.S.C.C.A.N. 4639, 4639 (noting ERISA was enacted to bolster existing legislation which failed to regulate adequately private pension and welfare funds). The National Labor Relations Act of 1935 conferred some control over private plans. *Id.* There were also three federal statutes which, "although accomplishing different federal purposes and vested within different federal departments for enforcement," regulated the administration of private pension plans prior to ERISA's enactment. *Id.* at 4640-41. These statutes were the Internal Revenue Code of 1954, Pub. L. No. 591, 68A Stat. 134 (1954) (codified in 26 U.S.C. §§ 401-04; 501-03), the Labor and Management Relations Act, Pub. L. No. 103-465, 61 Stat. 136 (1947) (codified in 29 U.S.C. § 141) and the Welfare and Pension Plans Disclosure Act, Pub. L. No. 93-406, 88 Stat. 851 (1974) (codified in 29 U.S.C. § 301-309). *Id.* at 4641.

⁷ H.R. REP. NO. 533, 93d Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4641. In 1974, over 30 million employees were covered by private pension plans. *Id.* This growth, combined with a "startling accumulation of wealth to back the benefit structure" (in excess of \$150 billion in 1974), provided the "basis for legislative efforts . . . to assure equitable and fair administration of all pension plans." *Id.* The House Report chronicles the economic and social growth that preceded and fueled the private pension movement in the United States. *Id.* at 4640. Americans embraced "an accelerated interest in private retirement plans" in the years immediately preceding World War II that continued to gain momentum subsequently as the concept of retirement benefits was validated in the corridors of judicial and governmental power. *Id.*

⁸ H.R. REP. NO. 533, 93d Cong., 2d Sess. 2 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4640 (noting ERISA was designed to "promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits").

⁹ *Id.* at 4640. The dynamic surge in assets from increasingly urbanized society has sustained expanding private pension systems in United States. *Id.*

¹⁰ See *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2072 (1993) (discussing "tension between the primary [ERISA] goal of benefitting employees and subsidiary goal of containing pension costs"); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981).

The authors of the statute empowered ERISA participants and beneficiaries with primary enforcement powers consistent with Congress's fundamental purpose of protecting employees' rights to pension benefits.¹¹ To accomplish this objective, ERISA expressly authorizes numerous causes of action.¹² Ensuing suits have spawned an ongoing debate within the federal circuits regarding the scope of ERISA's participant status language and fiduciary disclosure duties.¹³ Such divergent judicial opinions concerning the interpretation of employees' standing to bring suit and employers' fiduciary duties under ERISA exemplify the tension existing between the statute's facially conflicting policy goals of benefiting employees and containing pension costs.¹⁴ As a result,

¹¹ H.R. REP. NO. 533, 93d Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4642 (anticipating civil litigation by participants and beneficiaries under ERISA).

¹² See Jody R. Nathan, *ERISA Nuts and Bolts*, 23 FALL-BRIEF 61, 61 (1993), available in WESTLAW, Labor and Employment library, at *1 (describing causes of action authorized under ERISA); see also 29 U.S.C. § 1132(a)(1)(A) (1988) ("Claims can be brought against plan administrators for failure to provide certain requested information."); 29 U.S.C. § 1132(a)(1)(B) (1988) (authorizing civil action by participants under ERISA "to recover benefits due under the terms of the plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the plan").

¹³ See *Fiduciary Responsibility: Labor Department Shifting Resources in Fiduciary Litigation*, 21 PENS. & BEN. REP. (BNA) 480 (Feb. 28, 1994), available in WESTLAW, BNA-PEN Library, at *5 (stating policy conflict has contributed to conflicting judicial opinions in federal circuits regarding employees' standing to bring ERISA actions and scope of employer's fiduciary duties); see also C. Thomas Mason, III, *ERISA Claims and Securities Arbitration*, in SECURITIES ARBITRATION 1994, at 105 (1994). The capacity of former employees and retirees to bring actions is tricky area and although former employees who have received all of their vested benefits are generally not granted standing to sue under ERISA, the courts have stopped short of blanket standing exclusion. *Id.*; Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. PITT. L. REV. 979, 990 (1993) (questioning "whether there is ever a fiduciary duty to disclose possible changes to a plan that are under consideration but have not yet been adopted or implemented").

¹⁴ See *supra* note 10 and accompanying text; see also *Mertens*, 113 S. Ct. at 2071 (emphasizing ERISA's conflicting policy foundations). In *Mertens*, a five-to-four decision, the Supreme Court advocated a strict ERISA construction, consistent with Congress's subsidiary objective of containing pension costs. *Id.* Although the *Mertens* court acknowledged ERISA's expansion of fiduciary duties from common law trust principles, the Court exercised a strict interpretation of the ERISA section permitting plan participants to bring civil actions to obtain "appropriate equitable relief" to redress statute violations. *Id.* at 2067. Specifically, the Court held that ERISA does not require nonfiduciaries "to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty" and does not authorize suits for money damages against nonfiduciaries. *Id.* The dissent acknowledged the majority opinion's strict interpretation of "appropriate equitable relief" available to plan participants under subsection (a)(3) of ERISA, but asserts an opinion more consistent with legislative purpose of providing expanded protection to employees' pension benefit rights. *Id.* at 2072. The dissent asserted that the statute "clearly does not bar" a cause of action by plan participants "against nonfiduciaries who participate in a fiduciary's breach of duty under the statute." *Id.* at 2074 n.1. The dissent noted that ERISA does not expressly prohibit plan participants' remedies against nonfiduciaries "who actively assist in the fiduciary's breach." *Id.* at 2074. Moreover, the dissent noted trust beneficiaries clearly had such a remedy under the common law trust principles that form the statute's core and that ERISA "was intended, above all, to protect the interests of beneficiaries." *Id.* at 2074.

some circuits have adopted a strict statutory interpretation of ERISA's "participant" language,¹⁵ while others have advocated a liberal construction, which is arguably more consistent with Congressional intent to protect workers' ERISA rights.¹⁶

The Mertens decision "became the unlikely occasion for a serious attempt to rewrite some of ERISA's enforcement provisions." Robert N. Eccles, *Mertens Mania*, 2 No. 3 ERISA LITIG. REP. 1 (1993), available in WESTLAW, ERISALR Library, at *1. On October 6, 1994, a bill was introduced before the 103d Congress, as drafted by the Department of Labor and U.S. Senator Howard H. Metzenbaum (D-Ohio), which would have authorized a court "to provide participants and beneficiaries the full economic value of any benefits they would have received absent" violations of ERISA. *Id.* at *2. Most importantly for the purposes of this Note, the bill would have reversed existing case law holding that a former employee who has received benefits from a plan no longer has standing to sue under ERISA as a plan participant or beneficiary. *Id.* Specifically, the bill would have amended 29 U.S.C. § 1132, to read: "Any former participant or beneficiary . . . shall be treated in the same manner as a participant or beneficiary for purposes of standing to bring a civil claim under [ERISA]." § 2531, 103d Cong., 2d Sess. § 231 (D) (1994). Although the bill was defeated in the 102d Congress, one observer of ERISA litigation predicted that "unhappiness about the trend of the decisions" will lead to its resurrection. Eccles, *supra*, at *2. It is submitted that the proposed bill would provide potential relief to those employees who relinquished their ERISA participant status when they accepted all of their pension benefits upon retirement. Specifically, the bill would offer an equitable solution to those retired employees who were encouraged to accept early retirement based on their employers' misstatements that no more lucrative plan amendments were being considered. Moreover, the proposed bill would prevent employer-fiduciaries from cutting pension costs and depleting the participant pool through their own malfeasance.

¹⁵ See *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1529 (10th Cir. 1993) (holding employees who had received lump-sum payments of all their vested benefits were not "participants" in an ERISA plan and thus lacked standing to bring claim for fraudulent discharge). Many other federal circuits have adopted a strict standard of ERISA standing. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986) (concluding retired employee was not "participant" in early retirement benefit plan and thus lacked standing to sue under ERISA). The United States Court of Appeals for the Fourth Circuit disregarded plaintiff's assertion that he was a "participant" because he would have been eligible for additional benefits "but for" his early retirement. *Id.*; *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (reasoning only former employee who has "reasonable expectation of returning to covered employment" or "colorable claim" to vested benefits may satisfy "may become eligible" language of ERISA's participant definition); *Yancy v. America Petrofina Inc.*, 768 F.2d 707, 708 (5th Cir. 1985) (excluding retirees who have accepted all benefits to which they are entitled from "participant" definition); *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985) (excluding all former employees who have "neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits from 'participant' status"). The dispute in *Firestone* was founded on the ERISA definition of plan participant. 29 U.S.C. § 1002(7). "'Participant' means any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer" *Firestone*, 489 U.S. at 115; see also *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986) (holding former employees, who had received their pension plan benefits in lump sum, if successful, would receive only damage award; award would have to constitute increase of vested benefits in order for retirees to be plan participants); *Saladino*, 754 F.2d at 476 (noting Congress did not intend to "burden plans with the cost of reporting and disclosing to amorphous, undefined group of individuals" without substantial interest).

¹⁶ See *Mullins v. Pfizer*, 23 F.3d 663, 667 (2d Cir. 1994) (concluding retiree had standing under ERISA since he would have been participant in early retirement plan "but for" his former employer's alleged misrepresentations); *Pace v. Signal Tech. Corp.*, 628 N.E.2d 20, 24 (Mass. 1994) (construing ERISA liberally to prevent employers from using "a statute

The courts are equally inconsistent in regard to the scope of employers' duty to disclose pension plan amendments under consideration, but not yet implemented.¹⁷ Some circuits have advocated an expansive fiduciary disclosure obligation,¹⁸ while others have merely prohibited a plan fiduciary from affirmatively misleading participants about employee benefit plan changes.¹⁹

This Note will analyze the divergent circuit interpretations of standing and employers' fiduciary duties under ERISA. Part One presents a broad overview of ERISA's statutory framework, detailing the right of employees and others to assert a claim for lost benefits. Based on an analysis of both judicial interpretations, this Note will conclude that a broad view of standing would better protect the interests of employees and beneficiaries. Part Two will focus on conflicting judicial interpretation of employers' fiduciary duties under ERISA. This Note advocates both a more expansive judicial interpretation of fiduciary disclosure duties and a more liberal statutory reading of ERISA standing criterion.

I. EMPLOYEE STANDING TO ASSERT CLAIMS FOR LOST BENEFITS UNDER ERISA

Under ERISA, a plan participant may bring a civil action to recover accrued benefits, to enforce rights or to clarify rights to future benefits under a pension plan.²⁰ A pre-condition to asserting

whose clear purpose [is] to benefit employees" as shield to conceal "any deceptive and wrongful acts they may have committed against their employees").

¹⁷ See *supra* note 13 and accompanying text; see also *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (affirming district court's decision that "an administrator who complies with the statutory standard for disclosure cannot be said to have breached [his] fiduciary duty by not providing earlier disclosure"); *Stanton v. Gulf Oil Corp.*, 792 F.2d at 435 (holding failure to furnish information regarding amendments to early retirement plan not violative of ERISA's disclosure provisions); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983); *Fentron Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982).

¹⁸ See *supra* note 17 and accompanying text.

¹⁹ See *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) ("Plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan."); *Drennan v. General Motors Corp.*, 977 F.2d 246, 250-52 (6th Cir. 1992) ("[M]aterial misrepresentations concerning a prospective or contingent ERISA plan would give rise to liability if the plan was under 'serious consideration'"); *Barnes v. Lacy*, 927 F.2d 539, 543 (11th Cir. 1991) ("[G]enerally, employers owe no fiduciary duty towards plan beneficiaries under ERISA" unless the employer "acts as both employer and plan administrator."); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) ("Misleading communications to plan participants regarding [ERISA] plan administration . . . will support a claim for breach of fiduciary duty.").

²⁰ 29 U.S.C. § 1132(a)(1)(B) (1988) (defining employees' rights to sue for benefits under plan).

such ERISA claims is to qualify within the meaning of the term "participant" under ERISA.²¹ There is disagreement among the federal circuits regarding the proper standing test to apply when former employees are seeking to assert ERISA claims.²² This discord reflects deep-rooted philosophical differences as to ERISA's fundamental policy goals.²³

*A. Narrow Reading of ERISA's Employee Standing to Sue
Language: Firestone and its Progeny*

The United States Supreme Court addressed the issue of employees' standing to assert an ERISA claim in *Firestone Tire & Rubber Co. v. Bruch*.²⁴ The *Firestone* Court held that only a former employee who may reasonably expect to return to "covered employment" or who has a "colorable claim" to vested benefits may bring an ERISA action under the statute's "participant" language.²⁵ Many courts have followed the standing test articulated in *Firestone*.²⁶ For example, the United States Court of Appeals for the Tenth Circuit in *Raymond v. Mobil Oil Corp.*,²⁷ held that retirees who had received a lump-sum payment of all the vested benefits to which they were entitled under the company pension plan were denied standing to sue under ERISA. Similarly, in

²¹ 29 U.S.C. § 1132(a) (1988) (defining participant); see also Roger C. Siske et al., *What's New in Employee Benefits: A Summary of Current Case and Other Developments*, in ALI-ABA Course of Study, Pension, Profit Sharing, Welfare and Other Comp. Plans, Oct. 6-8, 1994, Vol. 1, at 1, 188-94. "Disputes often develop with respect to whether or not a particular individual qualifies as a 'participant, beneficiary, or fiduciary' within the meaning of ERISA." *Id.*

²² See *supra* note 10 and accompanying text (noting dispute exists as to former employees' standing when they have received all vested retirement benefits).

²³ See *supra* notes 15-19 and accompanying text; see also 29 C.F.R. §§ 2509.75-5, 2509.78-6 (1992) (providing informal fiduciary guidelines under ERISA); Bantz *supra* note 13, at 980. "ERISA imposes fiduciary standards on persons who have discretionary authority with respect to the management of plan assets or the administration of a plan." *Id.*

²⁴ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 103 (1989) (holding that "participant" is an individual who "will prevail in a suit for benefits" or has eligibility to bring such suit); see *supra* note 13 and accompanying text.

²⁵ *Firestone*, 489 U.S. at 117; see also *supra* note 15 and accompanying text; H.R. REP. No. 533, 93d Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.A.N. 4639, 4642. Vesting refers to the:

[N]onforfeitable right of interest which an employee participant acquires in the pension fund. The benefit credits may vest in the employee immediately, although in most cases participants do not become eligible for vesting of benefits until a stipulated age or period of service, or a combination of both, is attained.

Id.

²⁶ See Siske et al., *supra* note 21, at 188.

²⁷ *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1530 (10th Cir. 1993) (following *Firestone* rationale).

Mitchell v. Mobil Oil Corp.,²⁸ the Tenth Circuit denied a former employee standing under ERISA to challenge a pension plan amendment because he did not have a "colorable claim."²⁹ The court excluded former employees who had received all of their vested benefits from ERISA's "participant" status coverage.³⁰ Similarly, the Fifth and Ninth Circuits have adopted a strict reading of ERISA's standing criteria, and have been reluctant to apply equitable relief principles to former employees' ERISA claims.³¹

²⁸ *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir. 1990) (involving retiree who received all of his vested pension benefits in single lump sum upon retirement and was seeking "participant" standing to assert ERISA claim for lost benefits).

²⁹ *Id.* at 473-74. The *Mitchell* court reasoned that a restrictive interpretation of ERISA standing language was consistent with congressional policy to limit "the group of potential claimants . . . [in order to] avoid the creation of uncertainties about an employer's obligations under ERISA." *Id.*

³⁰ *Id.* (quoting *Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985)). The court observed that:

[T]he definition of 'participant' under ERISA excludes . . . former employees who have received a lump-sum payment of all their vested benefits because 'these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.

Id.; see also *Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 228 (5th Cir. 1981) ("May become eligible" language of ERISA plan participant definition was intended to apply only to current employees); 29 C.F.R. § 2510.3-3(d)(2)(ii) (1994) (denying participant status to employees who receive lump-sum payments or "series of distributions" which represent balance of credit under plan).

³¹ *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708 (5th Cir. 1985). The United States Court of Appeals for the Fifth Circuit held that Yancy lost his right to challenge a subsequent change to the company's early retirement pension plan when he accepted without dispute a lump sum retirement payment of "the full amount due to him under the terms of the [company] plan" effective at his retirement. *Id.* Yancy alleged that the plan fiduciaries' practice of changing the interest rate factors used to compute lump-sum distributions was an immediate impetus to his early retirement and a breach of his employer's fiduciary duty. *Id.* The *Yancy* court interpreted the ERISA definition of "participant" to encompass only those employees who owned vested benefits. *Id.* A former employee who "had received all benefits vested in him prior to his retirement" did not fall within this limited interpretation of ERISA "participant." *Id.*; see also *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986). Former employees whose pension benefits were fully distributed were denied standing to assert a claim since they were not "eligible to receive a benefit . . . at the time they filed suit." *Id.* The court reasoned that the former employees were not participants since they had received all of their vested benefits in a lump sum distribution. *Id.* Thus, the retirees in *Kuntz*, if successful, would only recover a damage award which would constitute an increase in vested plan benefits. *Id.* The Court followed previous circuit decisions that "former employees who have neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits simply do not fit within the 'may become eligible' language of section 1002(7)." *Id.* (citing *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985)). See generally *Bruch v. Firestone Tire & Rubber Co.*, 828 U.S. 134, 152-53 (1987) (refusing to say one could only bring claim for benefits if he or she was entitled to benefits); *Brach*, 489 U.S. 101, 117 (1989) (holding such interpretation "departs from the statutory language because to identify a 'participant' as any person who claims to be one begs the question of who is a 'participant' and renders [ERISA's 1002(7) 'participant'] definition superfluous").

B. Expanding the Scope of ERISA's Participant Status Language: The "But For" Standard and Equitable Relief

Several circuits have refused to interpret ERISA standing requirements so strictly.³² Instead, they have granted standing under ERISA to former employees even though they received all of the vested benefits to which they were entitled upon retirement.³³ These courts have reasoned that former employees should be given the opportunity to show that they would have been participants in the employer's newly amended retirement program "but for" the fiduciary's affirmative material misrepresentations.³⁴

For instance, in *Vartanian v. Monsanto Co.*,³⁵ the plaintiff received a lump-sum distribution of all the vested benefits to which he was entitled under the company's benefit plan and retired before the company announced a more generous retirement program.³⁶ The plaintiff alleged that he was unable to make an informed early retirement decision due to the company's failure to disclose truthfully their intentions to increase early retirement incentives in the near future.³⁷ The United States Court of Appeals

³² See *infra* notes 33-70 and accompanying text.

³³ See *Early Retiree has ERISA Standing to Bring Misrepresentation Claim*, 21 Pens. & Ben. Rep. (BNA) 933 (May 9, 1994), available in WESTLAW, BNA-PEN Library, at *1. The Second Circuit followed the First and Fifth Circuits' view that retirees, although technically not plan "participants," have standing to sue under ERISA. *Id.*; see also *supra* note 16 and accompanying text.

³⁴ *Mullins v. Pfizer*, 23 F.3d 663, 667-68 (2d Cir. 1994) (granting retiree standing to bring misrepresentation suit against former employer regarding early retirement plan amendment announced shortly after retirement).

³⁵ *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994) (granting early retiree standing to sue former employer for breach of fiduciary duty where employer allegedly misrepresented intentions to institute increased early retirement incentives).

³⁶ *Id.* at 699. When Vartanian submitted a lump sum distribution request in accordance with company policy, company officials assured him that no early retirement incentive programs were currently being contemplated. *Id.* at 698-99. Actually, the company had already given "serious consideration" to offering a more favorable early retirement plan to facilitate future staff reductions. *Id.* at 699. Vartanian claimed that the company's misrepresentations caused him to retire before the more favorable plan was adopted. *Id.*

³⁷ *Id.* at 698. Monsanto Co. had frequently instituted early retirement incentive programs in the past. *Id.* In February 1991, Vartanian heard rumors that "Monsanto was going to offer a more favorable early retirement package as a retirement incentive in the near future." *Id.* Vartanian had an anticipated early retirement date of May 1, 1991. *Id.* In February or March 1991, and again in April, Vartanian's supervisors informed him that the company had "no plans" to offer an early retirement incentive package. *Id.* Vartanian expressed a willingness to postpone his early retirement date if such an incentive plan were offered. *Id.* at 699. Vartanian retired on May 1, 1991, taking a lump-sum distribution in accordance with the requirements of the 1986 plan. *Id.* Vartanian alleged that Monsanto was in fact giving serious consideration to offering a special voluntary retirement program in 1991 prior to the lump-sum benefit payment. *Id.* at 702.

for the First Circuit granted the plaintiff standing to assert an ERISA claim, despite his failure to satisfy the *Firestone* "colorable claim" criterion.³⁸

The court reasoned that the *Firestone* holding did not require a denial of plaintiff's standing to assert his claims because the Supreme Court's analysis in *Firestone* of ERISA "participant" status was developed "without addressing the issue of standing."³⁹ According to the *Vartanian* court, a denial of plaintiffs' standing to assert ERISA claims would thoroughly frustrate Congress's intention both to encourage a liberal interpretation of the statute's remedial provisions among the federal courts⁴⁰ and "to remove jurisdictional and procedural obstacles to [ERISA] claims."⁴¹

Moreover, such a holding would ignore many equitable and logical considerations.⁴² Prior to his retirement, Vartanian was unaware of the company's material misrepresentations and, therefore, could not have asserted a breach of fiduciary duty claim until after he had retired and received his lump-sum distribution.⁴³ Denying the plaintiff standing under such circumstances would deprive him of an adequate level of benefit protection and create an une-

³⁸ See *supra* notes 30 & 31 and accompanying text (noting previous federal circuit holdings denying former employees standing under similar factual circumstances); see also *Boren v. Southwestern Bell Telephone Co., Inc.*, 933 F.2d 891, 893 (10th Cir. 1991) (holding that since no contributions were made on his behalf, plaintiff was not entitled to vested benefits and could not be plan "participant" for ERISA purposes); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921 (3d Cir. 1990) ("In general, employees who retire and elect to receive retirement benefits without any intention of returning to employment do not have standing under ERISA to challenge subsequent changes to the retirement plan."); *Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 950-52 (6th Cir. 1990) (former employees lacked standing because they failed to satisfy *Firestone* standing test bestowing "participant" status only on those former employees with a "colorable claim" to vested benefits).

³⁹ *Vartanian*, 14 F.3d at 701 (refusing to interpret *Firestone* standing language as "straightforward formula" applicable in all cases).

⁴⁰ *Id.* at 702 (stating ERISA was designed to afford participants "broad remedies" for redressing violations); S. REP. NO. 127, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.A.N. 4639, 4871 (promoting full range of legal and equitable remedies available in both state and federal courts and removal of jurisdictional and procedural obstacles which in past appear to have hampered effective enforcement of fiduciary responsibilities).

⁴¹ *Vartanian*, 14 F.3d at 701-02 (quoting *Hughes v. General Motors Corp.*, 852 F.2d 568 (6th Cir. 1988)) ("Doctrine of standing is concerned with whether a person is the proper party to request adjudication of a particular issue.").

⁴² See *infra* notes 43-45 and accompanying text.

⁴³ *Vartanian*, 14 F.3d at 702. Although Vartanian was not "technically" a "participant" in the pension plan at issue, the court held that the plaintiff should be given the opportunity to show that "but for" his employer's wrongful conduct, he would have been a "participant" in the plan. *Id.*

qual bargaining relationship.⁴⁴ Such results would be inconsistent with legislative goals of protecting employees and offering employees' interests on par with those of their employers.⁴⁵

Denying standing would also have the illogical and unfair implication of limiting employees' right to sue to only those situations where employees become aware of their employers' breach prior to their receipt of retirement benefits.⁴⁶ Moreover, the denial of standing in cases of employer misrepresentation would permit employers to defeat employees' right to sue either by keeping their breach a well-guarded secret until the employees receive their benefits or by distributing a lump sum and terminating benefits before employees can file suit.⁴⁷

The Second Circuit has also adopted the "but for" analysis of employee standing under ERISA. In *Mullins v. Pfizer*,⁴⁸ plaintiff opted for early retirement from Pfizer Inc. on April 1, 1990.⁴⁹ On May 16, 1990, Pfizer announced a more favorable Voluntary Severance Option for which Mullins would have been eligible had he not already retired.⁵⁰ The plaintiff alleged that Pfizer had made deliberate material misrepresentations regarding the company's intentions to institute more lucrative early retirement incentives.⁵¹ Pfizer contended that Mullins had no standing to assert

⁴⁴ H.R. REP. NO. 533, 93d Cong., 1st Sess. 9, reprinted in 1973 U.S.C.A.N. 4639, 4646 (noting ERISA was designed to fulfill "need of workers for level of protection which will adequately protect their rights and just expectations").

⁴⁵ *Id.*

⁴⁶ *Vartanian*, 14 F.3d at 702 (quoting *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992)). "The employer should not be able, through its own malfeasance, to defeat the employee's standing." *Id.*

⁴⁷ *Id.* at 703 (acknowledging retired plaintiffs who had received all their vested benefits lacked standing under ERISA); The *Vartanian* court also held:

[W]here the employee shows that in the absence of the employer's breach of fiduciary duty he would have been entitled to greater benefits than those to which he received, then his receipt of payment cannot be used to deprive him of 'participant' status and hence, standing to sue under ERISA.

Id. at 703; see also *supra* notes 15 & 38 and accompanying text (surveying federal circuits that have adopted strict standard of ERISA standing).

⁴⁸ *Mullins v. Pfizer*, 23 F.3d 663, 667 (2d Cir. 1994) (holding retiree—no longer technically benefit plan "participant" after his retirement—had standing under ERISA since he would have been early retirement plan "participant" but for his former employer's alleged misrepresentations).

⁴⁹ *Id.* at 665. On April 1, 1990, Mullins signed an early retirement form and terminated his employment with Pfizer. *Id.*

⁵⁰ *Id.* The Voluntary Severance Option offered early retirement benefits in addition to pre-existing Pfizer retirement benefits. *Id.*

⁵¹ *Id.* The District Court interpreted Mullins' complaint to allege "that Pfizer had constructively discharged Mullins by falsely denying that the VSO was under consideration and thereby encouraging him to take early retirement before the VSO went into effect." *Id.*

the ERISA claim because he retired before the new plan was offered.⁵² The *Pfizer* court followed the approach taken in the First Circuit by permitting the plaintiff to show that "but for" Pfizer's misrepresentation, he would have been a "participant" in the new plan.⁵³ In this way, the Second Circuit prevented the fiduciary from defeating the employee's standing through its own impropriety.⁵⁴

Similarly, in *Christopher v. Mobil Oil Co.*,⁵⁵ the Court of Appeals for the Fifth Circuit validated the "but for" standard for determining standing under ERISA.⁵⁶ In *Christopher*, plaintiffs alleged that Mobil had constructively discharged hundreds of employees by wrongfully inducing them into early retirement.⁵⁷ Mobil contended that plaintiffs did not have standing because they had failed to satisfy the *Firestone* test to be an ERISA "participant".⁵⁸ The Court rejected Mobil's claim, reasoning *Firestone*

⁵² *Id.* at 667.

⁵³ *Mullins v. Pfizer*, 23 F.3d 663, 667 (2d Cir. 1994).

⁵⁴ *Id.* at 668 (quoting *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992)).

⁵⁵ 950 F.2d 1209 (5th Cir. 1992).

⁵⁶ *Id.* at 1221. "[It is] logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee would be a current employee with a reasonable expectation of receiving benefits." *Id.*

⁵⁷ *Id.* Until 1977, the standard method of receiving pension benefits at Mobil was in the form of an annuity. *Id.* In 1977, Mobil instituted a lump sum pension benefit option. *Id.* "To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a net worth independent of the pension, equal to at least \$250,000." *Id.* On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including an increase in the eligibility threshold from \$250,000 to \$450,000. *Id.* These changes would apply to all employees retiring after January 31, 1985. *Id.* A crucial choice had been presented to employees who would have met the lower threshold but were uncertain to meet the increased threshold for the lump sum option. *Id.* The lump sum pensions were worth 40% more than the annuity, so those employees uncertain to reach the raised eligibility plateau had a strong inducement to pursue early retirement during the six month window period. *Id.* The crux of the dispute, however, centered on circumstances that unfolded following the announcement of the amended plan. *Id.* Mobil had originally notified their employees that the changes were subject to Internal Revenue Service approval. *Id.* In September 1984, the IRS "expressed concern that the amended plan could result in benefits favoring highly compensated employees." *Id.* at 213. "In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold in individual cases for valid cause shown." *Id.* This amendment resulted in a favorable IRS evaluation issued on November 23, 1984. *Id.* The problem was that while Mobil announced the IRS approval to its employees on December 21, 1984 (before the six month window period had expired), it "did not notify its employees of the waiver provision until well after the expiration of the six month window [period]." *Id.* As a result, plaintiffs who had submitted their retirement notices between August and October 1984 (and had retired on January 1, 1985) filed an ERISA claim for wrongful constructive discharge. *Id.* at 1212-13.

⁵⁸ *Id.* at 1220 (holding plaintiffs had "neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment").

did not create a "straightforward [standing] formula" across the full "spectrum" of all possible ERISA claims.⁵⁹ The *Mitchell* court recognized that a litigant other than a current employee or person with a claim to benefits must be able to challenge an employer action which deprives a former employee of benefits.⁶⁰ Moreover, the Court feared that such a strict application of *Firestone* would allow the employer to deny the employee standing "through its own malfeasance."⁶¹

The "but for" test is both logically reasonable⁶² and schematically consistent with ERISA's broad "zone of interests" protection.⁶³ The zone of interests approach was recognized in *Hughes v. General Motors Corp.*⁶⁴ The *Hughes* court based its standing inquiry on "whether a person has alleged such a personal stake in the outcome of a justiciable controversy that he should be entitled to obtain its judicial resolution."⁶⁵ The plaintiffs in *Hughes* were

⁵⁹ *Id.* at 1221. The *Mitchell* court saw decisions like *Yancy* and *Berger* as merely occupying the narrow end of the interpretive spectrum regarding ERISA standing and not dispositive of the full range of potential interpretations of ERISA's "participant" language. *Id.*

⁶⁰ *Christopher*, 950 F.2d at 1222. In sum, the Court reasoned that "the standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing." *Id.*

⁶¹ *Id.* at 1221. For example, in cases involving allegations of discharge, "it would be unusual" to deny standing to a former employee solely because he lacked a claim for vested benefits or a reasonable expectation of returning to covered employment. *Id.*; see also 29 U.S.C. § 1140 (1988) (making it unlawful for employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising right provided under ERISA).

⁶² See *supra* note 46 and accompanying text (noting that employers would be able to deceive employees without impunity in absence of "but for" standard).

⁶³ *Vartanian*, 14 F.3d at 702. Vartanian was a "participant" at the time of the alleged misrepresentations and the plan administrators had a duty not to affirmatively mislead him regarding changes to the company's pension benefit system. *Id.*; see also *Early Retirement: Court Reinstates ERISA Charges of Deception For Not Disclosing Offer*, 21 Pens. & Ben. Rep. (BNA) 436 (Feb. 21, 1994), available in WESTLAW, BNA-PEN Library, at *2 (applying broader "zone of interests" test).

⁶⁴ *Hughes v. General Motors Corp.*, No. 87-1506, 1988 WL 72742, at *2-3 (6th Cir. July 14, 1988) (noting ERISA "manifests an intention that the right to bring claims concerning pension benefits should be limited to those who are, or claim they are, entitled to receive a benefit from a pension plan").

⁶⁵ *Id.* at *3. Hughes was a retired employee of General Motors Oldsmobile division. *Id.* A company pension program coordinator had assured Hughes that Oldsmobile was not contemplating a program of increased early retirement benefits. *Id.* at *1. Relying on such advice, both Hughes and a second plaintiff, Pettit, submitted written notices of their intentions to retire on May 1, 1980. *Id.* In May 1980, Oldsmobile offered special early retirement benefits to certain employees in an attempt to reduce its salaried workforce. *Id.* Both Hughes and Pettit would have been eligible for the amended plan. *Id.* Plaintiffs claimed that they were entitled to additional benefits due to Oldsmobile's misrepresentations about its intent to offer a more favorable early retirement scheme. *Id.*

receiving retirement benefits, but claimed that they were entitled to additional benefits under a pension plan amendment instituted after they had retired.⁶⁶ The Court of Appeals for the Sixth Circuit exercised "traditional concepts of standing" in granting these retirees standing.⁶⁷ The *Hughes* court refused to condition a former employee's standing to sue for additional benefits on his ability to prove his entitlement to those additional benefits, since such logic would turn the traditional concept of standing "on its head."⁶⁸

ERISA zone of interests protection was also exercised in *Astor v. International Business Machines Corp.*⁶⁹ In *Astor*, plaintiffs were granted standing to allege that their employer had coerced them into participating in an early retirement program, even though they had received all of the benefits to which they were entitled under the plan.⁷⁰ According to the Sixth Circuit, the plaintiffs' concerns were within the "zone of interests" that ERISA was designed to protect.⁷¹

⁶⁶ *Id.* at *2 (reasoning plaintiffs fit "precisely within the plain language [of ERISA]").

⁶⁷ *Id.* at *3. The District Court had previously denied plaintiffs "participant" standing "since the benefits sought were first made available as the result of an amendment adopted after plaintiffs retired." *Id.* at *2. The District Court viewed plan effective upon plaintiffs' retirement and amended plan offered after retirement as "separate and distinct 'employee benefit plan[s]' for the purpose of determining who is a 'participant' having standing." *Id.* The Court of Appeals rejected such rationale whose "practical effect . . . was to require that plaintiffs prevail on the merits—demonstrate that they are entitled to the additional benefits—as a prerequisite to qualifying for the standing necessary to adjudicate the merits of their claims." *Id.*; see also *Data Processing Service v. Camp*, 397 U.S. 150, 153-54 (1970). "The question of standing . . . concerns . . . whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute" and where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. *Id.*

⁶⁸ *Hughes*, 1988 WL 72742, at *4. "Standing focuses on a person's effort to get his complaint before a court and not on the issue he wishes to have adjudicated." *Id.* Although plaintiffs were granted standing, their claims were not heard as the Court lacked subject matter jurisdiction. *Id.* Plaintiffs claimed that they would have been entitled to additional benefits under the terms of the plan "but for" defendants "maliciously, falsely [and] recklessly" leading plaintiffs to believe that no plan amendments were forthcoming. *Id.* at *5. The Court held that such claims "cannot fairly be said to be claims by a participant seeking to recover benefits or enforce or clarify rights 'under the terms of the plan.'" *Id.* Nevertheless, the Court showed reluctance to deny plaintiffs a forum and expressed a desire to amend such inequitable congressional legislation. *Id.*

⁶⁹ *Astor v. International Bus. Mach. Corp.*, 7 F.3d 533, 538-39 (6th Cir. 1993).

⁷⁰ *Id.* (rejecting employer's "strained interpretation" of ERISA employee standing criterion).

⁷¹ *Id.* (granting plaintiffs standing since they had a sufficient "personal stake in the outcome of a justiciable controversy"); cf. *Teagardner v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 950-51 (6th Cir. 1990).

II. EMPLOYERS FIDUCIARY DUTIES UNDER ERISA

Legislators intended ERISA both to protect the interests of employee benefit plan participants and alternately to avoid undue hardships on the private pension plan system.⁷² These competing policies are evident in its statutory language which features both traditional trust principles to protect workers' interests⁷³ and strict reporting and disclosure rules⁷⁴ to shelter fiduciaries' investments and monitor pension plan financing.⁷⁵ In short, ERISA's strict fiduciary disclosure language⁷⁶ is at odds with ERISA's design to foster employee benefit protection.⁷⁷ As a result, circuit courts disagree on the scope of a fiduciary's ERISA duty to disclose to plan participants potential plan changes under consideration, but not yet implemented.⁷⁸

A. *Legislative History and Common Law Origins of Fiduciary Duties under ERISA*

ERISA establishes fiduciary standards for employers who exercise discretionary authority over pension plan asset management and plan administration.⁷⁹ Employers often engage in discretionary policy decisions such as creating, amending or terminating a

⁷² Bintz, *supra* note 13, at 990 (detailing relevant case law regarding whether plan fiduciaries are obligated to disclose changes in employee pension plans that are "under consideration," other than pursuant to ERISA's express disclosure rules).

⁷³ 29 U.S.C. § 1001(b) (1988) (establishing standards of conduct, responsibility, and obligation for fiduciaries in order to protect interests of participants in employee benefit plans); see also *Drennan v. General Motors Corp.*, 977 F.2d 246, 250 (6th Cir. 1992) (discussing Congress's intent in enacting ERISA and fiduciary duties under ERISA).

⁷⁴ See Bintz, *supra* note 13, at 981-82. An ERISA "plan administrator is required to provide a summary plan description to each participant within . . . 120 days of the plan becoming subject to ERISA's reporting and disclosure rules." *Id.*; see also 29 C.F.R. § 2520.102.2 (1974) (outlining contents of summary plan description).

⁷⁵ 120 CONG. REC. 29,928, 29,953 (1974) (statement of Sen. Nelson). "Congress [is] acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted." *Id.*

⁷⁶ 120 CONG. REC. 29,928, 29,945 (1974) (statement of Sen. Long). "[W]e know that new pension plans will not be adopted and that existing pension plans will not be expanded . . . if the costs are made overly burdensome, particularly for employers." *Id.*

⁷⁷ H.R. REP. NO. 533, 93d Cong., 2d Sess. 3, reprinted in 1974 U.S.C.C.A.N. 4639, 4642 (indicating ERISA is attempt to balance interests of employers in maintaining flexibility in design and operation of their pension programs, and rights and expectations of employees in benefits protection); see 120 CONG. REC. 29,192, 29,198 (1974) (statement of Rep. Ullman) (noting disclosure requirements have been carefully designed to provide adequate protection for employees and, at same time, provide favorable setting for growth and development of private pension plans).

⁷⁸ See *infra* note 82 and accompanying text (describing federal circuits' varied interpretations of fiduciary disclosure duties under ERISA).

⁷⁹ 29 U.S.C. § 1002(21) (1974). An employer is a fiduciary regarding a company pension plan to the extent that:

pension plan as well as administrative decisions regarding an existing plan.⁸⁰ Courts have been tolerant of employers' dual roles in designing and administering employee benefit plans,⁸¹ only imposing ERISA fiduciary obligations on employers acting in their

(i) he exercises any discretionary authority or discretionary control respecting management . . . or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Id.; see H.R. REP. NO. 533, 93rd Cong., 2d Sess. 2, reprinted in 1974 U.S.C.C.A.N. 4639, 4646. ERISA framers had "particular interest" in regulating "the conduct of administration and operations of pension plans." *Id.* Specifically, ERISA was enacted to foil the "grossly unfair" practice of holding "an employee accountable for [conditions] which disqualify him from benefits, . . . [even] if these conditions were stated in a misleading . . . manner." *Id.*; see also Ethan Lipsig et al., *Settlor Function Litigation Under ERISA*, C719 A.L.I.-A.B.A. EMPLOYEE BENEFITS LITIG. 295, 303 (1992) (noting "settlor" functions include "decisions relating to the establishment, termination and design of plans [as opposed to the management of plan assets] and are not fiduciary activities subject to Title I of ERISA"); *Barnes v. Lacy*, 927 F.2d 539, 543-44 (11th Cir. 1991) (holding ERISA fiduciary duties apply to employer acting as plan administrator); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989). "Employers who act as plan administrators assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA." *Id.*; *Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989). "When an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards." *Id.*; *United Indep. Flight Officers v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985). "[T]he administrator of a plan is a fiduciary only to the extent he is engaged in administration." *Id.*; *Gulf Resources & Chem. Corp. v. Gavine*, 763 F.Supp. 1073, 1081-82 (D. Idaho 1991). "Every decision that an employer makes which has some effect on the employee benefit plan, is not necessarily a decision which is controlled by ERISA's fiduciary standards." *Id.*

⁸⁰ *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1993) (illustrating difficulties encountered by courts in distinguishing between employer's "two hats," i.e. roles as plan administrator and officeholder).

⁸¹ See Lipsig et al., *supra* note 79, at 295, 297. "[U]nder ERISA, an employer may wear 'two hats,' one as the 'settlor' in designing an employee benefit plan and the other as a 'fiduciary' in administering the plan. *Id.* An employer is not a fiduciary when it is acting in the settlor capacity." *Id.*; Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, ALL-ABA EMPLOYMENT & LAB. REL. L. CORP. COUNS. & GEN. PRAC., Mar. 5, 1994, at 563, 581. "Participants often challenge the actions of plan fiduciaries who wear 'two hats,' regardless of whether such actions were taken in the . . . plan administration context." *Id.*; William L. Scogland, *Fiduciary Duty: What Does it Mean*, 1989 A.B.A. SEC. TORT & INS. PRAC. 24, 806. "[F]iduciaries may wear two hats. . . courts have been tolerant of this dual role, distinguishing when a fiduciary is acting in his role as fiduciary of the plan as opposed to when he is serving as a businessman and making decisions for the business." *Id.*; see also *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1993) ("[M]isleading communications to plan participants 'regarding plan administration' will support a claim for breach of fiduciary duty."); *United Mine Workers of America v. Powatan Fuel*, 828 F.2d 710, 713 (11th Cir. 1987) (holding president "assumes fiduciary duty 'only when and to the extent' that they function in their capacity as health plan fiduciaries, not when they conduct business that is not regulated by ERISA"); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985). "[A] simplistic formulation of the distinction is that a person is not acting as a fiduciary when he makes business decisions that affect employee plans, but is a fiduciary when he acts with respect to a plan in an attempt to effect business ends." *Id.*

discretionary capacity as plan administrators.⁸² ERISA's statutory language, however, does not expressly enumerate an employer's fiduciary obligations.⁸³ Rather, ERISA's fiduciary standards are founded upon common law trust principles.⁸⁴ Thus, employers acting as fiduciaries are required to communicate facts material to the beneficiaries' interests if the employer knows the information is unavailable to the beneficiary and would be necessary to protect the beneficiary.⁸⁵

ERISA imposes three general obligations on employers acting as fiduciaries to plan participants; such duties are consistent with common law trust principles.⁸⁶ First, employers must comply with ERISA's "prudent person rule,"⁸⁷ which requires a fiduciary to dis-

⁸² See *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) (noting ERISA does not interfere with employer acting solely as businessman in interest of business as opposed to acting in capacity as fiduciary of company pension plan); see also *Amato*, 773 F.2d at 1416-17 (employers do not have fiduciary status under ERISA when conducting regular business activities).

The courts have identified discretionary policy decisions not subject to ERISA fiduciary obligation. Compare *Powatan Fuel*, 828 F.2d at 713-14 (stating president paying business expenses of company in time of potential company collapse is not acting as trustee under ERISA, but rather is acting in company's interests), *West v. Greyhound Corp.*, 813 F.2d 951, 955-56 (9th Cir. 1987) (no breach of duty found when employer threatened to terminate employees who did not accept reduction in unaccrued benefits), *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986) (finding employer who terminated pension plan acted in corporate capacity and not as administrator), [and] *Moore v. Reynolds Metals Co.*, 740 F.2d 454, 456 (6th Cir. 1984) (stating employers have no affirmative fiduciary duty under ERISA to provide employees with pension plan at all), cert. denied, 469 U.S. 1109 (1985); with *Berlin*, 858 F.2d at 1163-64 (indicating any misrepresentations made to plan participants after serious consideration of potential plan changes could constitute breach of fiduciary duty); *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) (Stating that lying is inconsistent with duty of loyalty owed by all fiduciaries); [and] *Rosen v. Hotel & Restaurant Employees & Bartenders Union of Phila.*, 637 F.2d 592, 600 n.11 (3d Cir. 1981) (holding fiduciaries are under duty to communicate material facts to plan beneficiaries).

⁸³ See *Bintz*, *supra* note 13, at 984. "ERISA does not expressly enumerate the duties of a fiduciary, but rather relies on the common law of trusts to define the general scope of a fiduciary's responsibilities." *Id.*; Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985); see also 29 U.S.C. § 1103(a) (1988) ("Assets of an employee benefit plan shall be held in trust."); S. REP. NO. 127, 93d Cong., 2d Sess. 29 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4865. "[T]he fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the laws of trusts." *Id.*

⁸⁴ *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (stating ERISA common law trust principles prohibit use of pension plan assets for benefit of anything other than plan itself); see *supra* note 81 and accompanying text.

⁸⁵ *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750 (D.C. Cir. 1990) (stating duties of ERISA fiduciaries are not limited by statute's express provisions but instead include common law trust duty to disclose material information); see RESTATEMENT (SECOND) OF TRUSTS 173 (1959).

⁸⁶ *Berlin*, 858 F.2d at 1162 (explaining fiduciary standards imposed under ERISA); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982); see also 29 U.S.C. § 1104(a)(1) (discussing fiduciary duties).

⁸⁷ See 29 U.S.C. § 1104(a)(1)(B) (1988); see also *infra* note 85 and accompanying text.

charge his pension plan duties with the "care, skill, prudence and diligence" that a "prudent person" would use under similar circumstances.⁸⁸ Second, employers engaged in fiduciary activities must exercise a duty of loyalty to participants and beneficiaries,⁸⁹ by acting "solely in the interests of the plan's participants and beneficiaries."⁹⁰ Third, ERISA requires a fiduciary to act "for the exclusive purpose" of providing benefits to plan beneficiaries.⁹¹ Statutory framers, by incorporating such common law origins into the statute itself, acknowledged that fiduciaries' duties may surpass ERISA's explicit disclosure language.⁹² According to some commentators, such interpretation is consistent with the legislative goal of protecting employees' rights.⁹³

⁸⁸ 29 U.S.C. § 1104(a)(1)(B) (1988); *see also* *Eaves v. Penn.*, 587 F.2d 453, 457 (10th Cir. 1978). "The explicit language of . . . section 1104(a)(1)(B) indicates that the prudent person test applies to fiduciary obligations under ERISA." *Id.*

⁸⁹ *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988) (quoting *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984)). "The prudent man standard, combined with the duty of loyalty imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation." *Id.*

⁹⁰ *Berlin*, 858 F.2d at 1162 (citing *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 158 (1985)) ("[U]ltimate consideration [toward achieving ERISA's underlying purpose concerns] enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries"); *Donovan*, 680 F.2d at 271 (noting all decisions regarding ERISA plans "must be made with an eye single to the interests of the participants and beneficiaries").

⁹¹ 29 U.S.C. § 1104(a)(1) (1988) (requiring fiduciaries to discharge their duties for exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering plan).

⁹² 29 U.S.C. § 1104(a)(1)(B) (1988) (stating fiduciary must discharge its duties "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use"); *see* *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990) ("The duties of an ERISA fiduciary are not limited by that statute's express provisions."); 120 CONG. REC. 29,933 (1974) (remarks of Sen. Javits) (stating intent for "a body of Federal substantive law [to be] developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans"); *Bintz, supra* note 13, at 984 (stating Supreme Court has advocated "federal common law of rights and obligations under ERISA-regulated plans"). "Legislative history of ERISA contains no evidence of an intent to limit the scope of the federal common law rights and obligations that would be developed under ERISA." *Id.* at 988. Although ERISA does not define specifically whether scope of fiduciary's duty to disclose information to participants and beneficiaries extends beyond statute's express reporting and disclosure rules, questionable logic would support the notion that a fiduciary's disclosure duties to plan participants is limited to the statute's express language. *Id.*

⁹³ *Eaves v. Penn.*, 587 F.2d 453, 457 (10th Cir. 1978) (case law and legislative history of ERISA demonstrate prudent person test is identical to standard developed in common law of trusts); *Morrissey v. Curran*, 567 F.2d 546, 548-49 (2d Cir. 1977); S. REP. NO. 127, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974, U.S.C.C.A.N. 4838, 4864-66; *see also supra* notes 74 & 82 and accompanying text.

B. Judicial Interpretation of ERISA Fiduciary Disclosure Duties

The United States Supreme Court has not defined the scope of an employer's fiduciary duty to disclose under ERISA.⁹⁴ Consequently, the law remains unsettled regarding whether fiduciaries have a disclosure duty beyond ERISA's specific reporting and disclosure rules.⁹⁵

Some courts have refused to recognize a fiduciary disclosure duty beyond ERISA's specific reporting and disclosure rules.⁹⁶ For example, in *Porto v. Armco, Inc.*,⁹⁷ the Court of Appeals for the Eighth Circuit concluded that administrators do not have to provide disclosure earlier than required by ERISA's statutory disclosure standards in order to meet their fiduciary duty.⁹⁸ Commentators have noted that the *Porto* court failed to reconcile ERISA's broad fiduciary duty language with the statute's strict reporting

⁹⁴ See *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) (denying certiorari to hear issue); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *Moore v. Reynolds Metals Co.*, 740 F.2d 454, 456 (6th Cir. 1984), *cert denied*, 469 U.S. 1109 (1985).

⁹⁵ *Bintz*, *supra* note 13, at 990 (describing unsettled state of case law in this area). Compare *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) (stating that company is not acting as fiduciary agent when deciding to amend or terminate welfare benefits plan); *Barnes v. Lacy*, 927 F.2d 541, 544 (11th Cir. 1991) (company did not breach duty by failing to notify employee of amendment provisions in plan); *Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 229 (3d Cir. 1989) (employer's lawful termination decision absent misrepresentation designed to mislead employees is not covered by ERISA); *United Mineworkers of Am. v. Powatan Fuel*, 828 F.2d 710, 710 (11th Cir. 1987) (business decision not involving ERISA); [and] *Porto v. Armco*, 825 F.2d 1274, 1276 (8th Cir. 1987) (ERISA plan administrator complied with statutory standards and therefore could not be held liable for not providing earlier disclosure) with *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 134-35 (3d Cir. 1993) (failure to disclose considerable efforts being undertaken to implement retirement benefits program constituted breach of fiduciary duty under ERISA); *Drennan v. General Motors Corp.*, 977 F.2d 246, 252 (6th Cir. 1992) (stating General Motors had fiduciary duty to keep class informed so participants could make appropriate decision); *Eddy*, 919 F.2d at 750 (fiduciary had duty to inform plaintiff of all options when group policy was cancelled); *Berlin v. Michigan Bell Tel.*, 858 F.2d 1154, 1163-64 (6th Cir. 1988) (asserting that fiduciary duty to avoid misrepresentations arose once company gave serious consideration to plan); *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) (lying is inconsistent with duty of loyalty owed under ERISA) [and] *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (decisions must be made according to interests of corporation).

⁹⁶ See *supra* note 95 and accompanying text (comparing circuits' divergent interpretations regarding scope of ERISA's fiduciary duty requirements).

⁹⁷ 825 F.2d 1274, 1276 (8th Cir. 1987)

⁹⁸ *Porto*, 825 F.2d at 1276. Upon his retirement, Porto made an irrevocable decision to defer certain distributions from the company pension plan. *Id.* Subsequently, the company adopted a plan allowing "once irrevocable decisions on withdrawal choices upon retirement to be revocable." *Id.* The plan administrator notified local employed plan participants of the amendment, but did not inform local retired participants such as Porto. *Id.*

and disclosure rules.⁹⁹ Instead, the court reasoned that a fiduciary's duty is discharged once ERISA's express disclosure requirements have been met.¹⁰⁰ The *Porto* court's narrow holding is contrary to other circuit decisions which have expanded a fiduciary's disclosure duties beyond ERISA's express terms under certain conditions.¹⁰¹

For instance, in *Berlin v. Michigan Bell Telephone Co.*,¹⁰² plaintiffs alleged that they had been misled intentionally into retirement based on the company's assertions that the latest early retirement incentive package had been a "one-time offer."¹⁰³ The Court of Appeals for the Sixth Circuit held that while fiduciaries must avoid making material misrepresentations to plan participants, fiduciaries are not affirmatively obligated to communicate with potential plan participants about future pension plan incentives.¹⁰⁴ Under such a narrow rationale, a fiduciary would not be penalized for declining to comment about the possibility of future plan changes.¹⁰⁵ Such an inequitable result contradicts ERISA's

⁹⁹ *Id.* at 1276 ("The fiduciary duty imposed by ERISA is generally applied to management of plan assets."); see *Bintz*, *supra* note 13, at 1018. "ERISA's fiduciary duty rules clearly extend to the administration of a plan as well as the management and investment of plan assets." *Id.*; see also 29 U.S.C. § 1002(21) (1988).

¹⁰⁰ *Porto*, 825 F.2d at 1276. "As a matter of law, a breach-of-fiduciary-duty claim cannot be based on a failure to disclose when the statutory disclosure requirements have been met." *Id.*; see also *Kyle v. Stewart Title Co.*, 788 F. Supp. 321, 324 (S.D. Tex. 1992) (stating fiduciary fulfilled its obligations to plan participants by merely complying with ERISA's express reporting and disclosure requirements).

¹⁰¹ See *supra* note 23 and accompanying text; see also *Palin v. Casey*, 664 F.2d 854, 858-59 (1st Cir. 1981). The United States Court of Appeals for the First Circuit recognized that specific circumstances may obligate a fiduciary to disclose plan amendments prior to the date required by ERISA's express reporting and disclosure provisions. *Id.* The court reasoned that a trustee's actions in regard to communicating plan changes to participants is governed by a "fundamental fairness" criterion. *Id.* A fiduciary has neglected such "fairness" obligation when, for example, "pension eligibility rules are changed without giving notice to those who, with minimal effort, might easily have avoided the loss of [their] pension rights." *Id.* at 859; *Agro v. Joint Plumbing Ind. Bd.*, 623 F.2d 207, 211 (2d Cir. 1980); *Valle v. Joint Plumbing Ind. Bd.*, 623 F.2d 196, 203 (2d Cir. 1980).

¹⁰² See *Berlin*, 858 F.2d at 1164 (stating employers' "material misrepresentations" may constitute breach if future plan amendments have received serious consideration); see also *infra* note 118 and accompanying text.

¹⁰³ *Berlin*, 858 F.2d at 1160 (emphasizing difficulty inherent in determining when employer's conduct became sufficiently "serious" consideration regarding future plan changes).

¹⁰⁴ *Id.* at 1164. Company had made available special early retirement incentives to employees retiring between October 1, 1980 and December 1, 1980. *Id.* at 1156-57. Subsequently, company announced a second early retirement window period of enhanced incentives for employees retiring between June 1, 1982 and July 31, 1982. *Id.* Plaintiffs were employees who had retired between these two window periods on the strength of company's alleged assertions that no new plan was being considered. *Id.*

¹⁰⁵ *Id.* at 1164; see also *Bintz*, *supra* note 13, at 997 (advocating that no affirmative duty to disclose prospective plan changes should be imposed).

basic common law trust foundations and is inconsistent with ERISA's objective of protecting employees' rights to pension benefits.¹⁰⁶

In contrast, other circuits have required fiduciaries not only to disclose information expressly required by ERISA, but also to avoid affirmatively misleading participants regarding potential plan amendments, including those under consideration but not yet implemented.¹⁰⁷ For instance, in *Fischer v. Philadelphia Electric Co.*,¹⁰⁸ the Court of Appeals for the Third Circuit prohibited plan administrators from making affirmative material misrepresentations to plan participants about employee pension plan changes.¹⁰⁹ The plan fiduciary had failed to inform inquiring employees about an early retirement plan under consideration.¹¹⁰ The Court found the company's furtive efforts to conceal violative of ERISA's fiduciary spirit¹¹¹ and imposed a heavy disclosure duty

¹⁰⁶ See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 158 (1985) "Courts must always bear in mind . . . the underlying purposes of ERISA—enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries." *Id.*

¹⁰⁷ See *supra* note 95 and accompanying text (noting disparate judicial opinion regarding scope of fiduciary disclosure obligations).

¹⁰⁸ *Fischer*, 994 F.2d 130, 133 (3rd Cir. 1993) (stating company was both employer and plan administrator and therefore had fiduciary duty to discharge its duties "solely in the interests of the participants and the beneficiaries").

¹⁰⁹ *Id.* at 135. Evidence indicated Philadelphia Electric Co. ("PEC") had been seriously contemplating, as early as October, 1989, adopting an early retirement plan to reduce costs. *Id.* at 131-32. PEC's practice gave informational retirement interviews to prospective retirees some months before they wished to retire. *Id.* at 132. Prospective retirees, prompted by circulating rumors about early retirement program, approached company interviewers about six months before early retirement plan in question was announced. *Id.* Although PEC was in fact contemplating such a plan, it instructed retirement interview counselors to merely inform interviewees "exactly what the plan called for at the time." *Id.* The plan that was finally announced on April 19, 1990 provided favorable options to employees who elected to retire between July 15 and September 15, 1990. *Id.* Plaintiffs were former PEC employees who retired between January 1 and April 1, 1990 and therefore did not qualify for benefits under new early retirement plan. *Id.* Plaintiffs claimed that PEC had a fiduciary obligation under ERISA to tell the truth about the contemplated plan when asked by plan participants. *Id.* at 133.

¹¹⁰ See *supra* note 109 and accompanying text. PEC could not avoid its fiduciary obligations by claiming that retirement interview counselors were simply uninformed and therefore were telling the truth as far as they knew. *Fischer*, 994 F.2d at 135. The Court held such fiduciary obligations could not be "circumvented by building a 'Chinese wall' around those employees on whom plan participants reasonably rely for important information and guidance about retirement. *Id.* Simply put, when a plan administrator speaks, it must speak truthfully. *Id.*

¹¹¹ *Fischer*, 994 F.2d at 135. The court stated that:

[A] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation was made. All else equal, the more seri-

on the plan administrators.¹¹² In so holding, the court conformed ERISA's narrow reporting and disclosure rules to its broad trust law duties of loyalty and prudence.¹¹³

Similarly, in *Drennan v. General Motors Corp.*,¹¹⁴ the Court of Appeals for the Sixth Circuit embraced a broad interpretation of ERISA fiduciary duties.¹¹⁵ The plan administrator in *Drennan* had consistently informed plaintiffs that a new retirement plan would not be made available to them,¹¹⁶ despite the fact that the company seriously considered otherwise.¹¹⁷ As in *Fischer*, the *Drennan* court imposed an affirmative duty on plan fiduciaries to disclose to affected employees information about future plan amendments under serious consideration.¹¹⁸ The court limited

ously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality.

Id.

¹¹² *Id.* at 133 (refusing to condone company's "conspiracy of silence . . . aimed at keeping confidential the considerable efforts being taken to implement an early retirement incentive program").

¹¹³ *Id.* at 133 (quoting *Berlin*, 858 F.2d at 1158). "A fiduciary may not materially mislead those to whom the duties of loyalty and prudence are owed." *Id.*

¹¹⁴ 977 F.2d 246, 248-49 (6th Cir. 1993). Class of former General Motors (GM) employees decided to accept lump sum payments under company sponsored unemployment plan ("SUP"). *Id.* at 248. In exchange, these former employees relinquished certain employment and seniority rights. *Id.* at 249. GM introduced a more generous Voluntary Termination of Employment Program (VTEP) following employees' departure and excluded them from new plan because company "no longer considered [them] to be GM employees, having relinquished and forfeited all of their employee rights as a result of accepting the SUP buyout." *Id.* Employees sued GM claiming that it breached its fiduciary duty by not disclosing that it had been seriously considering implementing more generous VTEP options. *Id.* at 248.

¹¹⁵ *Id.* at 252 (noting "GM was impressed with a fiduciary duty to keep [employees] abreast of its consideration to permit their participation" in new retirement program).

¹¹⁶ *Id.* at 249 (noting GM had been instructing management "to convey negative impressions to the [plaintiffs] indicating that VTEP would not be available for their participation and that the program was 'dead in the water' as far as laid off employees were concerned").

¹¹⁷ *Id.* at 251. "The district court's finding that GM had a VTEP-type plan for laidoff . . . employees under 'serious consideration' while it was conducting various management-Class meetings . . . is well supported by the record." *Id.*

¹¹⁸ *Id.*

[T]he duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected employees.

Id.; Compare *Berlin*, 858 F.2d at 1164 (stating if the "plan fiduciary does communicate with potential plan participants after serious consideration has been given concerning a future [plan] offering . . . then any material misrepresentations may constitute a breach of their fiduciary duties.") with *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) (holding "it is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect"), *Barnes v. Lacy*, 927 F.2d 541, 541-42 (11th Cir. 1991) (holding company had complied with ERISA's disclosure rules and therefore fulfilled its fiduciary responsibilities since summary plan description specifically stated that employer retained right to amend plan) and *Sutter v. BASF Corp.*, 964 F.2d 556, 561, 563 (6th Cir. 1992) (holding employer abided by strict standards since its decision occurred prior to enactment of ERISA).

this duty, however, by permitting non-disclosure of the substantive aspects of the bargaining process.¹¹⁹

In addition, in *Eddy v. Colonial Life Insurance Co.*,¹²⁰ the Court of Appeals for the District of Columbia held that a fiduciary's duty is "not discharged" by simply satisfying ERISA's express reporting and disclosure rules.¹²¹ Rather, the court imposed an obligation on the plan fiduciary not only to avoid misleading participants, but also to fulfill the affirmative duty to disclose to participants "complete and correct material information" about plan options.¹²²

These circuit decisions are consistent with ERISA's objective to protect the interests of participants and its broad fiduciary language which originated in the common law of trusts.¹²³ Nonetheless, statutory language, while providing broad fiduciary conduct guidelines, does not specify the extent to which a fiduciary must disclose information to participants and beneficiaries.¹²⁴ Although ERISA's express reporting and disclosure rules impose minimal requirements on plan administrators,¹²⁵ the statute does not address whether a fiduciary is obligated to disclose possible changes to a plan under consideration but not yet adopted or imple-

¹¹⁹ See *Drennan*, 977 F.2d 246, 251 (citing *Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 226 (3d Cir. 1989)) (noting while fiduciary must give inquiring employees "complete and accurate information," such duty does not require disclosure of "substantive aspects of the bargaining process").

¹²⁰ 919 F.2d 747 (D.C. Cir. 1990). Eddy asked insurer, Colonial Life, prior to expiration of company group health policy, "about [his] conversion rights underneath [the] policy." *Id.* at 749. A Colonial Life supervisor "said that [Eddy] did not have the right to convert [his employment-based coverage] to an individual policy." *Id.* As a result, Eddy did not "convert" his coverage and his health coverage terminated on September 14, 1987. *Id.* Eddy sued Colonial Life for allegedly misinforming him about his conversion rights, thereby breaching its fiduciary duties under ERISA. *Id.* at 748; see *supra* note 95 and accompanying text.

¹²¹ *Eddy*, 919 F.2d at 750. The court held that fiduciaries' duties are "not limited by [ERISA's] express rules but instead include duties derived from common law trust principles." *Id.* The court reasoned that broad obligations of common law trust principles "carries through in all of the fiduciary's dealings with beneficiaries." *Id.* The court also held that "Colonial Life was required to do more than simply not misinform, Colonial Life also had an affirmative obligation to inform—to provide complete and correct material information on Eddy's status and options." *Id.* at 757.

¹²² *Id.* at 752 (explaining affirmative duty of disclosure is "well-rooted in the common law of trusts").

¹²³ See *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N.Y. 483, 489, 121 N.E. 378, 379, 154 N.Y.S. 1123, 1123 (1918) (Judge Benjamin Cardozo espousing fiduciaries' trustee obligations); see also *infra* note 130 and accompanying text.

¹²⁴ See *Bintz*, *supra* note 13, at 988. The express language of ERISA provides little indication as to whether there is ever a fiduciary duty to disclose information to participants and beneficiaries. *Id.* Neither ERISA's fiduciary duty nor reporting and disclosure rules directly address the relationship between the two sets of rules. *Id.*; see also *supra* notes 72, 74, 76-78 and accompanying text.

¹²⁵ See *supra* notes 74 & 76 and accompanying text.

mented.¹²⁶ The aforementioned circuit court decisions which advocate such an affirmative fiduciary disclosure duty are consistent with legislative intent to promote plan beneficiaries' interests without placing undue burdens on the pension and welfare benefit system.¹²⁷ Statutory framers designed ERISA to afford workers greater benefits protection than had existed previously under common law.¹²⁸ Utilizing ERISA's expanded trust principles to extend its limited disclosure rules and to create a fiduciary obligation to disclose plan changes under consideration would be consistent with legislative intent to expand benefit protection.¹²⁹

As adopted by some federal circuits, the affirmative fiduciary duty to disclose information to participants about potential plan changes is admittedly problematic for pension plan administrators.¹³⁰ Such a duty may preclude businesses' ability to encourage employees to retire under a current early retirement incentive package.¹³¹ It is submitted, however, that employees' interests in receiving all of the information available about future plan amendments under serious consideration outweigh the employers' interest in effectuating business objectives that cannot be realized without deception.

Moreover, a policy requiring greater disclosure will not subvert either of the competing goals of ERISA, namely to protect employees' rights and to avoid undue burdens on the pension and welfare

¹²⁶ Bintz, *supra* note 13, at 990.

¹²⁷ See *supra* notes 83-85 and accompanying text (describing underlying trust principles constituting ERISA's foundation).

¹²⁸ *Donovan v. Mazzola*, 716 F.2d 1226, 1231-32 (9th Cir. 1983) ("courts have . . . recognized that in enacting ERISA Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds"); see also *Sinai Hosp. of Baltimore, Inc. v. National Benefit Fund for Hosp. & Health Care Employees*, 697 F.2d 562, 565 (4th Cir. 1982) (noting requirements of common law trusts relating to employee benefit trust funds have been made more exacting by congressional action); *Marshall v. Glass/Metals Assoc. & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 383 (D. Haw. 1980) ("[Section 1104] establish[es] uniform federal requirements to be interpreted both in the light of the common law of trusts, as well as with a view toward the special nature, purpose, and importance of modern employee benefit plans"); H.R. REP. NO. 1280, 93d Cong., 2d Sess. 302 (1974), reprinted in 1974 U.S.C.A.N. 5038, 5083; Hutchinson & Ondrasik, *Fiduciary Responsibility under the Employee Retirement Income Security Act*, HANDBOOK OF EMPLOYEE BENEFITS 737, 742-54 (1984); Joan Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 INDUS. REL. L.J. 183, 223 (1987). "[W]hen a party is a fiduciary, ERISA imposes stringent standards for fair dealing, standards that are more stringent than what existed under prior state trust law." *Id.*

¹²⁹ See *supra* note 93 and accompanying text.

¹³⁰ Bintz, *supra* note 13, at 997 (asserting fiduciary duty to disclose potential plan changes not yet implemented must be "strictly limited"). *Id.*

¹³¹ See *supra* notes 75-76 and accompanying text.

system.¹³² Rather, Congress's goal of expanding workers' benefit protection may be accomplished by extending ERISA's fiduciary duty provisions to require plan administrators to disclose to inquiring plan participants information about potential plan changes under serious consideration.¹³³ Such an expansive duty would conform with ERISA's underlying trust law foundations and would protect workers from being "betrayed by silence."¹³⁴

III. CONCLUSION

Federal courts have divided greatly over the issue of standing under ERISA. While some circuits have narrowly construed the term "participant," others have more accurately allowed a broader construction. Under the "but for" test, the circuits have given a prospective plaintiff the opportunity to show that "but for" material misrepresentations on the part of the plan provider, he or she would have been a participant in the plan. Such a broad interpretation of ERISA standing is consistent with the intent of Congress to protect beneficiaries' interests and would offer a remedy to retirees who relied on information provided by plan administrators. Moreover, the equitable value of such an interpretation would outweigh any resulting economic burden on the pension and welfare system.

In addition to allowing standing to a broader class of ERISA participants, the federal courts should uniformly impose ERISA's common law trust principles upon plan administrators and require administrators to affirmatively disclose potential changes in their benefit plans. The federal courts should not confine fiduciaries' obligations to ERISA's express disclosure and reporting duties. The view espoused by some circuits, essentially requiring nothing more than a "no comment" from plan administrators,

¹³² See *supra* notes 72, 74, 76-78 and accompanying text (discussing balance between ERISA's purpose of protecting employee rights and not placing undue burdens on pension and welfare system).

¹³³ See *supra* notes 79-80 and accompanying text (discussing fiduciary duty outlined by Congress).

¹³⁴ *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N.Y. 483, 489, 121 N.E. 378, 379, 154 N.Y.S. 1123, 1123 (1918). Judge Cardozo interpreted fiduciaries' trustee duties as follows: A beneficiary . . . may be betrayed by silence as well as by the spoken word. The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface or lurking beneath the surface, but visible to his practiced eye.

Id.

leaves no recourse for those improperly induced by a plan administrator. An informed judgment cannot be made without full disclosure of the underlying facts governing a benefit plan. Only a broad fiduciary duty standard will sufficiently fulfill Congress's intent to protect workers' rights without imposing undue burdens on the system or allowing employers to benefit from their own malfeasance.

Steven Davi

